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**IN THE
COURT OF APPEALS OF INDIANA**

RYAN DAY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 40A04-0607-CR-406
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0212-FC-196
40C01-0212-FC-208

APRIL 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Ryan Day appeals the sentence imposed by the trial court after he pled guilty to three counts of possession of stolen property (Class D felonies); three counts of burglary (Class C felonies); and four counts of forgery (Class C felonies).

We affirm.

ISSUE

Day raises one issue for our review, which we restate as: whether the trial court abused its discretion in finding the facts pertaining to Day's criminal history.

FACTS AND PROCEDURAL HISTORY

On December 6, 2002, Day was charged with four counts of receiving stolen property (Class D felonies); two counts of theft (Class D felonies); and three counts of burglary (Class C felonies). In addition, the State asked for a habitual offender enhancement. On December 23, 2002, Day was charged with four counts of forgery (Class C felonies) and one count of theft (Class D felony). On May 14, 2003, Day entered a joint plea agreement where he would plead guilty to all counts in both cases in exchange for (1) dismissal of the habitual offender enhancement and (2) concurrent sentences for the December 6, 2002, and December 23, 2002 charges.

Day was sentenced on May 14, 2003. The trial court found the following aggravators: (1) Day's lack of a high school diploma or G.E.D. and (2) Day's criminal history. The trial court noted that Day's criminal history included a juvenile adjudication, two prior felony convictions, four misdemeanor convictions, and a probation revocation. Prior to the pronouncement of the sentence, Day admitted to the

juvenile adjudication, to a “pretty significant [criminal] history” for a person who is only twenty-one years old, and to his failure to obtain a diploma or G.E.D. The evidence of the remainder of his criminal history was found in the pre-sentence investigation report.

DISCUSSION AND DECISION

Day contends that the trial court abused its discretion in relying on the pre-sentence investigation report in finding the particulars of his criminal history. Day contends that a portion of the report’s criminal history is based on non-judicial sources and that such sources were found insufficient to support a finding of the existence of a criminal history in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

Sentencing decisions are within the sound discretion of the trial court. *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). Under the sentencing statute which was in effect at the time day was sentenced, the trial court had the discretion to determine whether a presumptive sentence should be increased because of aggravating circumstances. *O’Connell v. State*, 742 N.E.2d 943, 951 (Ind. 2001). Sentencing decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Beck v. State*, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003).

Our supreme court has held that *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) is applicable to Indiana’s sentencing scheme, and therefore “the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana’s existing sentencing laws.” *Mask v. State*, 829 N.E.2d 932, 936 (Ind. 2005) (quoting *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005)). However, *Blakely* does

not require that a jury find all the facts used to enhance a sentence beyond the statutory maximum. *Id.* The requirements of the Sixth Amendment can be met, and a finding of an aggravating circumstance by the trial court is proper, when the court finds prior criminal history. *Id.* at 936-37. *Blakely* has no effect on sentencing enhancements based on a defendant's prior criminal history, juvenile adjudications, and aggravators derived from that history. *Mitchell v. State*, 844 N.E.2d 88, 91 (Ind. 2006).

In *Ryle v. State*, 842 N.E.2d 320, 322-23 (Ind. 2005), *cert. denied*, 127 S.Ct. 90, 166 L.Ed.2d 63 (2006), our supreme court acknowledged that certain documents, such as police reports, are not proper documents for establishing criminal history. The court held, however, that a trial court may rely on a pre-sentence report in determining a defendant's criminal history. *Id.* at 324. The court noted that the preparation of pre-sentence reports is done according to strict requirements and that these requirements ensure the reliability of the preparer's work product. *Id.* The court further noted that in *Shepard*, the Supreme Court reaffirmed its holding in *Taylor v. United States*, 494 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) "that when a later court determines the character of a prior conviction, it can examine the 'statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented,' or 'some comparable judicial record of this information.'" 842 N.E.2d at 325 (quoting *Shepard*, 125 S.Ct. at 1257, 1263).

Day asserts that *Ryle* was wrongly decided. In addition, Day notes that unlike in *Ryle*, where the criminal history was based on court records cited in the pre-sentence

report, a portion of his criminal history is apparently based on law enforcement reports. Specifically, Day points to the Clark County Prosecutor's Office as the source for his criminal history in Clark County. Finally, Day asserts that he had no notice that the trial court was going to rely on "these factors" to aggravate his sentence. Appellant's Brief at 10.

As the courts in both *Shepard* and *Ryle* held, reliance upon police reports to find criminal history is improper. Accordingly, Day could have shown the court's finding of criminal history to be improper by showing reliance on such non-judicial documents. However, Day's argument is merely supposition that improper reliance on non-judicial documents occurred. There is no evidence to support his claim, and we will not speculate. Accordingly, we cannot agree that the trial court abused its discretion.

Furthermore, we note that Day's one-sentence claim that he was surprised by the trial court's finding of "these factors" is cast into doubt by his signing of a document advising him that his prior criminal history could be used against him. The "Advisement, Waiver of Rights, Guilty Plea and Recommendation," specifically states that "[i]f you have a prior history of juvenile or criminal offenses, that fact alone may cause you to receive a harsher penalty than you would otherwise achieve." Appellant's App. at 49.¹

¹ The State points to Day's failure to challenge the pre-sentence investigation report as an admission to the report's accuracy. In *Ryle*, however, our supreme court held that "using a defendant's failure to object to a pre-sentence report to establish an admission to the accuracy of the report implicates the defendant's Fifth Amendment right against self-incrimination." 842 N.E.2d at 323 n. 5.

CONCLUSION

The trial court did not abuse its discretion in finding that Day's criminal history was an aggravator.

Affirmed.

DARDEN, J., and BARNES, J., concur.